

LAW OFFICES OF RANDALL S. WAIER
Randall S. Waier, CSB 75430
20241 Birch Street, Suite 103
Newport Beach, CA 92660
(949) 476-2511

Attorneys for Defendants Ubiquity, Inc.; Chris Carmichael; Connie Carmichael;
Brenden Garrison; Henry Blessley; and Nicholas Mitsakos

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Kay Strategies, Inc., a Nevada
corporation, **Makaiwi & Associates, Inc.**,
a Nevada corporation, **Result**
Corporation, a Nevada corporation,

Plaintiffs,

vs.

Ubiquity, Inc., a Nevada corporation,
Chris Carmichael, an individual, **Connie**
Carmichael, an individual, **Brenden**
Garrison, an individual, **Henry Blessley**,
an individual, **Nicholas Mitsakos**, an
individual, **Gregg E. Jacklin**, an
individual, **Szaferman, Lakind,**
Blumstein & Blader, P.C., a New Jersey
professional corporation,

Defendants.

CASE NO. 15CV2720-H-DHB

NOTICE OF MOTION AND
MOTION TO DISMISS;
MEMORANDUM OF POINTS AND
AUTHORITIES; AND
DECLARATION OF CONNIE
JORDAN (CARMICHAEL) IN
SUPPORT THEREOF
[FRCP Rule 12(b)(5) and Rule
12(b)(6)]

Date: February 29, 2016
Time: 10:30 a.m.
Dept.: 15A

1 TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on February 29, 2016, at 10:30 a.m., or as soon
3 thereafter as the matter may be heard, in Department 15A, before the Honorable
4 Marilyn L. Huff, defendants Ubiquity, Inc., Chris Carmichael, Connie Jordan
5 (Carmichael), Brenden Garrison; Henry Blessley; and Nicholas Mitsakos
6 (“defendants”) will move to dismiss the action pursuant to FRCP Rule 12(b)(5)
7 because the summons and complaint were improperly served, and pursuant to
8 FRCP Rule 12(b)(6), because plaintiffs’ complaint fails to state any claim upon
9 relief can be granted, on the ground that plaintiffs expressly released defendants
10 from any liability under these claims.
11

12 This motion will be based on this Notice of Motion and Motion, the
13 accompany Memorandum of Points and Authorities, the pleadings and papers filed
14 herein, and the supporting declaration of Connie Jordan (Carmichael).
15

16 Dated: January 28, 2016 **LAW OFFICES OF RANDALL S. WAIER**
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19 By: /s/Randall S. Waier
20 Randall S. Waier
21 Attorneys for Defendants Ubiquity, Inc.; Chris
22 Carmichael; Connie Carmichael; Brenden
23 Garrison; Henry Blessley; and Nicholas
24 Mitsakos
25 E-mail: admin@waier.com
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MEMORANDUM OF POINTS AND AUTHORITIES

I. *Introduction.*

Kay Strategies, Inc., Makaiwi & Associates, Inc., JTS Investments, Inc. and Result Corporation collectively have sued Ubiquity, Inc., Chris Carmichael, Connie Carmichael, Brenden Garrison, Henry Blessley, Micholas Mitsakos, Gregg E. Jacklin, and Szaferman, Lakind, Blumstein & Blader, P.C. for various violations of federal and California securities laws, including Section 10(b) of the Securities & Exchange Act of 1934, and Securities & Exchange Commission Rule 10b-5. Tethered to these claims are California Commercial Code and common law tort theories of recovery, namely California *Commercial Code* § 8401, fraud, negligent misrepresentation, breach of fiduciary duty and legal malpractice.

As alleged in the complaint, the salient facts are:

- Ubiquity, on March 5, 2013, merged with Fermo Group, Inc., which was a publicly traded company, and that Ubiquity thereafter engaged in a pyramid scheme “to manipulate the market and receive personal gain through securities fraud.”¹ [Complaint (“Comp.”), ¶ 18]

¹ Ubiquity, and the other defendants do not understand why this allegation is included in the complaint. This is not a class action for securities fraud as alleged. Furthermore, other allegations dealing with other alleged non-descript pyramid schemes and “pump and dump” circumstances have no relevance to any of the personal claims of relief of the plaintiffs.

1 • To accomplish this alleged pyramid scheme, defendants
2 allegedly made material misrepresentations “regarding the operation of” Ubiquity
3 to “unknowing investors” that, if purchased, they could “sell UBIQ stock in the
4 public markets.” [Comp., ¶ 27]

6 • Defendants also allegedly made “material misrepresentations to
7 “unknowing investors” that they would file paperwork (“8a12g”) to become an
8 obligatory reporting company under the Securities Act of 1934,” which they did not
9 do. [Comp., ¶ 29]

12 • Defendants “intentionally” did not file “SEC required
13 documents” in an effort to restrict investors “from using Rule 144 exemption,
14 which requires that [Ubiquity] to be current in SEC filings.” [Comp., ¶ 32]

16 • Sea Coast Advisors, Inc., which is *not* a party, through “its
17 officer, Troy Flowers,” *in early 2014*, “presented an investment opportunity to
18 [p]laintiffs to purchase Ubiquity stock. Sea Coast owns “10% or more of”
19 Ubiquity. The investment opportunity “included the purchase of shares ... not ...
20 registered with the SEC.” [Comp., ¶ 41]

23 • In early June 2014, Robert Wheat, *plaintiffs’ “representative,”*
24 was informed orally by Mr. Flowers that “if the [p]laintiff’s [sic] purchased the
25 UBIQ shares, ... UBIQ would guarantee that the restriction on the shares would be
26 lifted by September 27, 2014,” by providing “a Rule 144 Legal Opinion to remove
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1 the restrictive trading legend [on the share certificates] by” that date, and “would re-
2 issue “legend free” certificates. [Comp., ¶ 44]

3 • Mr. Wheat also was orally advised by an attorney, defendant
4 Gregg S. Jacklin “that UBIQ would be making SEC filings to become an obligating
5 reporting company, ... and would be uplisted to the NASDAQ exchange.” [Comp.,
6 ¶ 46]

7 • Allegedly predicated on these verbal representations, plaintiffs
8 “purchased UBIQ shares *through a private stock transaction.*” [Complaint, ¶ 47]

9 • Ubiquity, however, failed “to *timely* provide the Legal Opinion
10 Letters,” instead “the Legal Opinion Letters were provided many months”
11 thereafter. [Comp., ¶ 50]

12 • Allegedly, plaintiffs also presented their “certificated securities
13 in registered form to UBIQ with a request to register the securities without a
14 restrictive legend on or before October 2, 2014,” which “UBIQ refused.” [Comp., ¶
15 54]

16 • On November 18, 2014, Messrs. Chris Carmichael and Brenden
17 Garrison allegedly verbalized to Mr. Wheat that Ubiquity “would not free up the
18 stocks unless [p]laintiffs invested additional capital into UBIQ.” [The complaint is
19 silent as to whether plaintiffs succumbed to this alleged verbalization and invested
20 additional capital in UBIQ.] [Comp., ¶ 57]

1 • On February 25, 2015, [p]laintiffs and UBIQ entered into two
2 confidential settlement agreements, “both of which have been rescinded.” The first
3 settlement agreement allegedly was rescinded, by written notice *on July 1, 2015*.
4

5 [Comp., ¶ 61]

6 • “[P]laintiffs and UBIQ entered into a second settlement
7 agreement dated July 3, 2015, which superseded the first settlement agreement,”
8 and that on *October 21, 2015*, “[p]laintiffs provided written notice of rescission of”
9 the second settlement agreement. [The October 21, 2015 rescission notice is not
10 attached to the complaint, *and there is no allegation that plaintiffs offered to restore*
11 *the consideration they received, namely “600,000 fully paid and non-assessable”*
12 *Ubiquity shares, as initially legend*. Rather plaintiffs concede they sold the stocks,
13 *albeit* for an alleged loss. *Comp.*, § 59]
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16 • Plaintiffs did not append either of the two settlement agreements
17 to their complaint.²
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22 ² Though plaintiffs are not required to attach documents on which they rely
23 upon, defendants are entitled, in initiating a Rule 12(b)(6) motion, to attached and
24 refer to such documents to rebut plaintiff’s claims. See, i.e. *Branch v. Tunnell* (9th
25 Cir. 1994) 14 F.3d 449, 454. This Court may consider the full text of a document,
26 if the complaint refers to the document, the document is central to plaintiffs’ claim,
27 and, no party questions the authenticity of the document attached to the Rule
28 12(b)(6) motion. *Collins v. Morgan Stanley Dean Witter* (5th Cir. 2000) 224 F.3d
496, 498-499. Here, Ubiquity has appended the July 3, 2015 referred and executed
comprehensive settlement agreement between Ubiquity and plaintiffs; the
authenticity of which cannot be challenged.

1 • The second settlement agreement, *dated July 3, 2015*, expresses
 2 that defendants agreed to accept “600,000 fully paid and non-assessable shares” of
 3 Ubiquity’s common stock “as settlement of all claims related to the Rule 144 Sales
 4 and Purchase Agreements.” Those shares would be “initially issued with [a]
 5 legend,” and that Ubiquity would provide an opinion letter “that the [s]hares are
 6 exempt under Rule 144 provided that the [defendants] provide ... with all required
 7 documents to issue the Rule 144 opinion in a timely manner.” Those shares were
 8 issued to plaintiffs. [*Jordan Dec.*, ¶ 3]

12 • The July 3rd settlement agreement contained a comprehensive
 13 release:

15 “2. The *Shareholders*, on behalf of themselves, their
 16 predecessors, successors, direct and indirect parent companies,
 17 direct and indirect subsidiary companies, companies under
 18 common control with any of the foregoing, affiliates and
 19 assigns, and its and their past, present, and future officers,
 20 directors, shareholders, interest holders, members, partners,
 21 attorneys, agents, employees, managers, representatives,
 22 assigns, and successors in interest, and all persons acting by,
 23 through, under, or in concert with them, and each of them,
 24 *hereby release and discharge the Company, together with its*
 25 *predecessors, successors, direct and indirect parent companies,*
 26 *direct and indirect subsidiary companies, companies under*
 27 *common control with any of the foregoing, affiliates and*
 28 *assigns and its and their past, present, and future officers,*
directors, shareholders, interest holders, members, partners,
attorneys, agents, employees, managers, representatives,
assigns and successors in interest, and all person acting by,
through, under or in concert with them, and each of them, from
all known and unknown charges, complaints, claims,
grievances, liabilities, obligations, promises, agreements,

1 *controversies, damages, actions, causes of action, suits, rights,*
 2 *demands, costs, losses, debts, penalties, fees, wages, medical*
 3 *costs, pain and suffering, mental anguish, emotional distress,*
 4 *expenses* (including attorneys' fees and costs actually incurred),
 5 and punitive damages, of any nature whatsoever, known or
 6 unknown, which either party has, or may have had, against the
 7 other party, whether or not apparent or yet to be discovered, or
 8 which may hereafter develop, for any acts or omissions, arising
 9 from or related to the Rule 144 Sales and the Purchase
 10 Agreements.

11 * * *

12 4. Subject to paragraph 1, this Agreement resolves any
 13 claim for relief that could have been alleged by the
 14 Shareholders, no matter how characterized, including, without
 15 limitation, compensatory damages, damages for breach of
 16 contract, bad faith damages, reliance damages, liquidated
 17 damages, punitive damages, costs and attorneys fees against
 18 Company arising from or related to Rule 144 Sales and the
 19 Purchase Agreements. Notwithstanding the foregoing, if either
 20 the Company or the Shareholders engage in any illegal
 21 actions(s) with respect to the execution of the terms of this
 22 Agreement before the entire amount set forth in Paragraph 1 is
 23 issued to the Shareholders, then the other party is entitled to
 24 make a claim for relief with respect to such illegal actions(s)."

- 25 • The settlement agreement also expressed a confidentiality

26 provision:

27 "7. The Parties shall keep the terms of this Agreement
 28 strictly confidential and agree not to disclose to any other
 person or entity the terms of this Agreement, except that the
 Parties may disclose the terms of this Settlement Agreement (a)
 their attorneys, accountants, auditors, financial advisors, and/or
 insurers, who shall be required to maintain and honor the
 confidentiality of such information; and (b) the extent required
 for tax returns and related documents. *The terms of this*
Settlement Agreement may be disclosed in any legal proceeding
concerning the enforcement of the Settlement Agreement,
provided that the party seeking to disclose it seeks a protective

1 *order requiring that the terms of the Settlement Agreement be*
 2 *maintained as strictly confidential, the intent being to preserve*
 3 *the strict confidentiality of this Settlement Agreement to the*
 4 *maximum extent possible.* In the event that a Party, or other
 5 person or entity in possession of this agreement or having
 6 knowledge of some or all of its terms, receives a valid
 7 subpoena, or is otherwise ordered by a Court or tribunal, to
 8 disclose any of the terms of this Agreement, the Party or other
 9 person agrees to notify all Parties in writing at least five (5)
 10 days in advance of the disclosure to afford the other Parties an
 11 opportunity to prevent or limit the disclosure or otherwise seek
 12 to maintain the strict confidentiality of the terms of this
 13 Agreement.”

14 • The settlement agreement contemplated an enforcement action,
 15 also requiring Ubiquity to abide by “the provisions of applicable securities laws in
 16 the disposition of any [s]hares ... acquired” in accordance therein. The second
 17 settlement agreement only allowed the parties “to make a claim for relief with
 18 respect to ... any illegal action[s] with respect to execution of the [settlement
 19 terms].” [Plaintiffs did not seek a protective order before disclosing some of the
 20 settlement terms in its complaint.]

21 • The second settlement agreement “resolved any claim for relief
 22 that *could have been alleged* ..., no matter how characterized, ... arising from or
 23 related to [the] Rule 144 Sales and Purchase Agreements.”

24 In the first count, plaintiffs aver that Ubiquity violated Section 10(b) of the
 25 Exchange Act and Rule 10b-5, arising out of the Rule 144 Sales and Purchase
 26 Agreements. The second claim for relief also stems from the Rule 144 Sales and
 27 Agreements.
 28

1 Purchase Agreements. The third count for violation of California *Corporations*
2 *Code* § 25401 again originates from the Rule 144 Sales and Purchase Agreements.
3 Likewise, the fourth through ninth claims for relief all revolve around or are
4 “related to the Rule 144 Sales and Purchase Agreements.”
5

6 Finally, the summons and pending complaint were not personally served on
7 any defendant. FRCP Rule 4(e)(2). Rather, the summons and pending complaint
8 were served by someone [unidentified] leaving copies thereof on the reception desk
9 at Ubiquity’s corporate offices in Irvine, California. [*Jordan* dec., ¶ 2] No other
10 method of service was used. None of the defendants were personally served, or
11 were the summons and complaint mailed to each of the defendants as required by
12 California *Code of Civil Procedure* § 415.20, one of the requirements for substitute
13 service. Nor was any personal service of the summons and complaint attempted
14 beforehand on any of the individual defendants. See, California *Code of Civil*
15 *Procedure* § 415.20(a). As to Ubiquity, the summons and complaint was not served
16 on an “agent authorized by appointment or by law to receive service of process.”
17 FRCP Rule 4(e)(2). [*Jordan* dec., ¶ 2]
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19 **II. Discussion.**

20 ***Rule 12(b)(5) Motion To Dismiss***

21 The summons and pending complaint have not been properly served on any
22 of the defendants.
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1 As to both individual and business entity defendants, service must be
2 accomplished by either:

- 3 • Personal delivery to the defendant or authorized agent [Cal. Civ.
4 Pro. Code § 415.10];
- 5 • Substitute service to someone else at defendants' residence or
6 place of business [Cal. Civ. Pro. Code § 415.20];
- 7 • Mail service coupled with acknowledgment of receipt [Cal. Civ.
8 Pro. Code § 415.30]; and
- 9 • Service by publication [Cal. Civ. Pro. Code § 415.50].

10 With respect to personal service, process cannot be left with another to
11 deliver to the defendant. See *FDIC v. Mt. Vernon Ranch, Inc.* (WD MO 1988) 118
12 FRD 496, 500. As to substitute service on individual defendants, delivery of
13 process may be had by leaving copies at defendant's "dwelling house or usual place
14 of abode with some person of suitable age and discretion then residing therein."
15 [FRCP 4(e)(2)] Regarding business entities, a corporation can be served by
16 delivering copies of the summons and complaint *to an authorized corporate officer*
17 *to receive service of process; or the person designated by the corporation as its*
18 *statutory agent for service; or the Secretary of State (upon court order authorizing*
19 *same).* [See Cal. Civ. Pro. Code § 416.20; and FRCP 4(h)(1).] Delivery of the
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1 summons and complaint to a firm's office manager for example, is *not* effective
2 service. *Ayres v. Jacobs & Crumplar, P.A.* (3rd Cir. 1996) 99 F.3d 565, 567.

3 Here, none of these authorized methods of service were accomplished. The
4 only method used was leaving copies of the summons and complaint at an
5 unattended reception desk. Accordingly, this Court should either quash the service
6 or dismiss according to FRCP 12(b)(5).
7

8
9 ***Rule 12(b)(6) Motion To Dismiss***

10 In plaintiffs' complaint, they refer to confidential settlement agreements, the
11 latest of which was entered into on October 21, 2015, but dated July 3, 2015.

12 Plaintiffs however do not annex these settlement agreements to their complaint.
13 The second settlement agreement is unambiguous, and contains express provisos
14 releasing "any claim for relief," "no matter how characterized," "arising from or
15 related to" the "Rule 144 Sales and Purchase Agreements."
16

17 A Rule 12(b)(6) dismissal motion may be employed when a plaintiff has
18 included allegations disclosing absolute defenses or bar to recovery. See, *Weisbuch*
19 *v. County of Los Angeles* (9th Cir. 1997) 119 F.3d 778, 783, fn. 1; and *Quiller v.*
20 *Barclays American/Credit, Inc.* (11th Cir. 1984) 727 F.2d 1067, 1069.
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22 Here, the July 3, 2015 settlement and release agreement referenced in ¶ 61 of
23 the pending complaint unveils an absolute defense to plaintiffs' complaint, namely
24 that all of plaintiffs' claims for relief, which arise from or relate to the Rule 144
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1 Sales and Purchase Agreements, are barred by the release provisions therein. Rule
2 12(b)(6) allows the Court to consider documents not physically attached to the
3 complaint if:
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5 • The complaint refers to such document;
6 • The document is central to plaintiffs' claims; and
7 • No party questions the authenticity of the copy attached to the
8 12(b)(6) motion. See, *Branch v. Tunnell* (9th Cir. 1994) 14 F.3d 449, 454. All of
9 these conditions have been met for the Court here to consider the release provisos in
10 the July 3, 2015 settlement and release agreement in ruling on defendants' Rule
11 12(b)(6) motion.
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15 That being said, the July 3rd settlement and release agreement unquestionably
16 released the defendants from liability for any of the claims of relief in plaintiffs'
17 complaint. All of defendants' misconduct alleged in the complaint, leading to
18 plaintiffs' alleged damages, revolve around or are related to the 2014 "Rule 144
19 Sale and Purchase Agreements," which plaintiffs contend they were duped into
20 executing by material misrepresentations, and *which occurred prior to the July 3rd*
21 *settlement agreement*. Boiled down to its barest, plaintiffs allege that defendants
22 conspired together to engage in a pyramid scheme in June 2014, by making material
23 representations to them or their agents, which induced them to purchase Ubiquity
24 shares through a private stock transaction. [Comp., ¶ 47] Accordingly, by the
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1 express terms of the July 3rd settlement and release agreement, plaintiffs
 2 compromised and released all known and unknown claims of relief “arising from or
 3 related to the Rule 144 Sales and the Purchase Agreements,” – the “private stock
 4 transaction.” In the settlement and release agreement, plaintiffs also acknowledged
 5 “that the issuance of the Shares was agreed upon as a compromise and final
 6 settlement of disputed claims.” [*Jordan* dec., ¶ 3, Ex. “1,” ¶ 6] In their complaint,
 7 plaintiffs admit receiving the shares, and that they sold the shares.³ The Court
 8 therefore should dismiss the action, since all of plaintiffs’ claims for relief were
 9 released, by the unambiguous expressions in the settlement agreement.
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 23 ³ In their complaint, plaintiffs contend that they unilaterally rescinded this
 24 settlement agreement, by some written, and unattached notification. [Comp., ¶ 59]
 25 However, plaintiffs concede in their pleading they resold the very consideration,
 26 namely the issuance of the shares, called for in the settlement and release
 27 agreement. To effect a rescission, a party to a contract must “[r]estore to the other
 28 party everything of value which he has received from him under the contract.”
 California *Civil Code* § 1691(b). Therefore, plaintiffs allegation of unilateral
 rescission is of no moment since they admit they sold the shares, and thus cannot
 restore this consideration to Ubiquity.

1 **III. Conclusion.**

2 Under either Rule 12(b)(5) or Rule 12(b)(6) this Court should dismiss
3 plaintiffs' entire action.
4

5 Dated: January 28, 2016

LAW OFFICES OF RANDALL S. WAIER

7 By: /s/Randall S. Waier

8 Randall S. Waier

9 Attorneys for Defendants Ubiquity, Inc.; Chris
10 Carmichael; Connie Carmichael; Brenden
11 Garrison; Henry Blessley; and Nicholas
Mitsakos

E-mail: admin@waier.com

CERTIFICATE OF SERVICE

I hereby certify that counsel of record for the Plaintiff's are being served with a copy of this document via electronic mail on this 28th day of January, 2016.

/s/ Randall S. Waier